160 U.S. 170

TRANSCRIPT OF RECORD.

160-170

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~369~~. 88

THE BOARD OF FLOUR INSPECTORS FOR THE PORT OF NEW ORLEANS ET AL., APPELLANTS,

vs.

BOOTH F. GLOVER AND FREDERICK J. ODENDAHL, COMPOSING THE FIRM OF GLOVER & ODENDAHL, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED FEBRUARY 12, 1892.

(14,975.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 4, 1895.

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a UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana, at New Orleans.

BOOTH F. GLOVER *et als.*, Appellees,
versus
THE BOARD OF FLOUR INSPECTORS IN AND for the City and Port of New Orleans, Appellant.
} No. 12011. In Equity.

Howe & Prentiss, Esqrs., for appellees: J. R. Beckwith, Esq., and Walter H. Rogers, Esq., att'y gen'l of La., for appellant.

Appeal from the U. S. circuit court, eastern district of La., New Orleans division, to the Supreme Court of the United States of America, at the city of Washington, D. C., returnable on the 25th day of February, A. D. 1892.

Transcript of Appeal.

1 Circuit Court of the United States, Eastern District of Louisiana, at New Orleans.

BOOTH F. GLOVER *et als.*
vs.
THE BOARD OF FLOUR INSPECTORS, &c., *et als.*
} No. 12011. In Equity.

Bill of Complaint.

Filed June 15, 1891.

To the judges of the circuit court of the United States in and for the fifth circuit and eastern district of Louisiana, holding sessions at New Orleans:

Booth F. Glover and Frederick J. Odendahl, composing the firm of Glover & Odendahl; William H. Matthews and George B. Matthews, composing the firm of Wm. H. Matthews & Bro.; Woodward, Wight & Co., Limited, a mercantile corporation created under the laws of the State of Louisiana; Jacques Trautman and Joseph Trautman, composing the firm of Jac. Trautman & Co.; J. & M. Schwabacher & Co., Limited, also a corporation of Louisiana; Michael A. Rogers, Smith Brothers & Co., Limited, also a corporation of Louisiana; William Cameron and John W. Castles, composing the firm of Cameron & Castles; Abraham Adler and William Adler, composing the firm of A. Adler & Co.; Hugh McCloskey and Patrick McCloskey, composing the firm of McCloskey Brothers; William B. Schmidt and Francis S.
2 Ziegler, composing the firm of Schmidt & Ziegler; Henry T. Cottam and Prudent Mallard, composing the firm of H. T.

Cottam & Co.; Leroy A. Goddard and John E. Hall, composing the firm of Goddard & Hall, of New Orleans; The Chambers-Roy Company, Limited, a corporation of Louisiana; Henry Lochte and William E. Murtagh, composing the firm of Henry Lochte & Co.; Henry R. Cogreve, Simon Pfeiffer, and Ariel B. Newman, composing the firm of S. Pfeiffer & Co.; William Flash, Henry Preston, and Isaac H. Stauffer, Jr., composing the firm of Flash, Preston & Co.; The Nicholas Burke Co., Limited, a corporation of Louisiana; Charles B. Buddecke; Lazard Goudchaux and Albert M. Silbernagel, composing the firm of Goudchaux & Silbernagel; Edward Feibelman, Thomas F. Feibelman, Jacob Feibelman, and Joseph Cohn, Jr., composing the firm of E. Feibelman, Sons & Co.; Frank J. Levis and August Levis, composing the firm of Levis Brothers; John M. Parker, Sr., John M. Parker, Jr., and William J. Montgomery, composing the firm of John M. Parker & Co.; Thomas H. Watson; James Miltenberger and Iveson G. Flower, composing the firm of Miltenberger & Flower; Henry Kahn and Lazard Levy, composing the firm of Kahn & Levy; Jerome B. Van Horn, J. Henry Lafaye, and Albert Mackie, all of the city of New Orleans, Louisiana, on behalf of themselves and their said firms and corporations as well as on behalf of all persons and corporations similarly situated, bring this their bill against—

The Board of Flour Inspectors for the City and Port of New Orleans and against Louis A. De Poincy, Michael J. Hodgins, Jeremiah F. Shaw, Leonhard Franz, and Patrick A. Looby, all of the city of New Orleans, who are the persons composing said board.

And thereupon your orators complain and say:

3 First. That your orators and each of them are engaged in the business of importing flour from St. Louis, in the State of Missouri, and from other cities in States other than Louisiana to New Orleans for sale, and such importation and sale forms a large and valuable part of their business, and any unlawful imposition in or restriction or diminution of their business is greatly injurious to them and inflicts on them and each of them irreparable injury; that each of them import for sale large quantities of such flour, amounting to each from 2,000 to 70,000 barrels per annum, and the majority of them import respectively from 15,000 to 70,000 barrels per annum.

Second. That your orators are each and all tax-payers of the city of New Orleans, either as individuals or as firms or corporations, and are deeply interested in and affected by the prosperity of the said city and greatly injured by any illegal imposition on its trade or any diversion of the same, and especially its trade in flour made from wheat.

Third. Your orators aver that The Board of Flour Inspectors of the City and Port of New Orleans, above named as a defendant in this bill, is composed of the individuals above joined as the other defendants herein, and the said defendant, Louis A. De Poincy, is the president thereof. The said members of said board have been appointed and the board is constituted and acts under the alleged authority of an act of the General Assembly of Louisiana approved March 16,

1870, being No. 71 of the extra session of that year; that by the fifth section of said act the duty of said board is defined and limited to the inspection of any lot or lots of flour (meaning wheat flour) imported in the city and port of New Orleans.

That by the sixth section it is provided that all flour im-
4 ported or coming to the port of New Orleans for sale shall be examined and inspected by the said board of flour inspectors for the purpose solely to ascertain its purity and soundness and to ascertain *it if* is of lawful weight, but not for the purpose of classification and grading (which are otherwise provided for), and if said flour is sound, pure wheat flour and if fully legal weight it shall be the duty of said inspectors to put their official brand upon each barrel, and if not sound and of full weight they shall refuse to brand the same at all. Said examination may be made by said inspectors of such portions of any parcel of flour as shall satisfy them of the character of the whole, and it may be made either on the levee or wharf or in the warehouse, as the owner or receiver of the flour may elect. The fee for this examination and inspection is fixed at two cents per barrel, whether branded or not, to be paid by the receiver or owner of the flour. It is further provided by said sixth section that it shall not be lawful to sell flour (meaning flour imported or coming to New Orleans for sale) in the city and port of New Orleans as sound and merchantable unless each barrel has the official brand of said inspectors.

It is provided by the seventh section of said act that no other person or persons shall have the right or privilege to inspect flour in the city of New Orleans except the aforesaid board of flour inspectors of the city and port of New Orleans, and when in any case the said inspectors are prevented from inspecting as aforesaid they shall be *i*ntitled to pay as though they had made the inspection as required by law, and in all cases these fees shall be recoverable by suit in the name of the board before any court of competent jurisdiction in the parish of Orleans.

By the eighth section of said act it is provided that all flour
brought to the city of New Orleans for consumption shall be
5 inspected by said inspectors, and your orators are informed and believe, and therefore aver, that the defendants claim that such inspection, as well as that of flour imported into New Orleans for sale, is compulsory at two cents per barrel.

Fourth. Your orators further aver that all wheat flour imported and coming to the port of New Orleans, whether for sale or consumption, is imported from St. Louis, in the State of Missouri, and from other points and places in States other than Louisiana, and is so imported in the course of interstate commerce, and amounts to upwards of 600,000 barrels per annum, the great bulk of which is so imported by your orators.

That such interstate commerce in flour is also largely carried on from said points and places in other States, such as St. Louis, Missouri, and other places in Louisiana by importations made from said points in other States than Louisiana directly to ports near markets within Louisiana for sale and consumption by river and

rail other than New Orleans, such as Plaquemine, Bayou Goula, Baton Rouge, Bayou Sara, Opelousas, Alexandria, Monroe, Shreveport, and other markets, and such importations amount to at least 100,000 barrels per annum; but there is no act, law, or ordinance requiring or establishing any inspection or such flour or any inspection fees on such flour or on any flour manufactured in any part of the State of Louisiana. It results that the compulsory inspection and fees of two cents per barrel imposed by the said act of 1870 are imposed as a charge, burden, impost tax, or duty only on flour so brought from without the State to New Orleans for sale or consumption and are imposed chiefly on flour so as aforesaid imported by your orators, to the great injury of the business of each of your orators.

6 Fifth. Your orators aver that wheat flour has in years lately past been manufactured in considerable quantities in the State of Louisiana and in the city of New Orleans; that considerable quantities of wheat are raised in this State, and the census returns or statistics show that the amount is increasing slowly. The census of 1880 shows 88 grist mills in Louisiana, with a capacity of upwards of 11,000 bushels per day, and upwards of one-third of the products of said mills was shown by said census to be wheat flour.

That, as complainants believe, the product of flour in Louisiana is not now less than in 1880 and will not be shown to be less by the census of 1890, although the details, so far as they can find, have not yet been published; that since the year 1877 there have been manufactured in the city of New Orleans alone not less than 60,000 barrels of flour, none of which has been subject to compulsory inspection. They aver that wheat flour produced or to be produced in Louisiana has not been, is not, and will not be under any existing statute of the State or by any regulation or ordinance subject to inspection or to any charges, toll, or impost therefor.

Sixth. Your orators aver that the said act No. 71 of 1870, which is the only statute of Louisiana which provides any inspection for wheat flour, is unconstitutional, null, and void, being in conflict with the Constitution of the United States. They aver that it confers on the defendant board herein power to inspect only flour imported into the city and port of New Orleans and does not impose any such charge on flour produced in the State, unless possibly the same is brought to New Orleans, *and* nor does it impose any such charge on flour imported from other States of the Union to cities, towns, ports, and markets in Louisiana other than New Or-

7 leans. It lays a discriminating charge and burden on flour brought to New Orleans which is not imposed on flour made in New Orleans or flour made in other parts of Louisiana and not brought to New Orleans for sale or consumption. It lays a discriminating charge and burden on flour imported from other States of the Union to New Orleans for sale or consumption which is not laid on and does not act with reference to flour imported from other States of the Union in very large quantities to cities, towns, and marts in Louisiana other than New Orleans. It applies this dis-

criminating charge, impost, toll, or duty on all flour imported into the port of New Orleans upon its arrival here in its original packages on the levee or wharf or in the warehouse or original receipt while it is on its way to the importer or as it reaches him. It establishes practically an import duty of two cents per barrel in favor of flour produced in the State of Louisiana outside of New Orleans and there sold or consumed or exported as against all flour imported or coming to New Orleans. It imposes practically an import duty of two cents per barrel in favor of all flour manufactured or which may hereafter be manufactured in New Orleans. It imposes practically a duty of two cents in favor of all flour imported from the other States of the Union into all places in Louisiana except New Orleans and against all flour imported from other States of the Union or from foreign countries into the port of New Orleans. It establishes a system which unlawfully regulates and discriminates in interstate commerce, and it violates the following provisions of the Constitution of the United States: Article one, section eight, clauses one and three, and section ten, clause two, and article four, section two, clause one.

Seventh. Your orators show that they respectively each receive their large consignments of flour from other States of the
8 Union almost daily, and, as each lot arrives at the port of New Orleans, the defendants claim and insist on the right and power to inspect the same on its arrival and to make such inspections compulsory and claim and demand their fees of two cents a barrel therefor on every barrel arriving, and if such fees are not paid the defendant board will bring a great multitude of suits and prosecution under said statute to enforce its illegal claims; that as to each of your orators such suits will be each of small amounts, in inferior courts, and will be of great number, each arising out of almost daily inspections and involving large, constant, and daily expense, many counsel fees, and much loss of time, vexation, annoyance, and irreparable injury; that there is no practicable method under the said act of 1870 or any other law of Louisiana of paying said fees to said board under protest and recovering the same; that such a course would involve for each of your orators a muliplicity of controversies and suits and great expense, loss of time, and vexation, and if each of your orators should recover judgments from time to time against the board for the return of such fees as unduly paid they could have no judgments for their counsel fees, nor has the defendant board any fund or property whatever to respond to the same, nor is there any appropriation or provision of law to pay the same, and the collection of such judgments or any of them would be utterly impossible. They aver that they are without any adequate remedy in the premises at law, and that their only remedy is in equity and an injunction is necessary for their relief, as hereinafter prayed for; that the fees demanded by the defendant board herein from your orators amount to from ten thousand to twelve thousand dollars per annum and will continue to be demanded in the future and year after year; that this

case arises under the Constitution and laws of the United
9 States, and the matter in dispute therein exceeds the sum of five thousand dollars, exclusive of interest and costs, and the matter in dispute as to each of your orators exceeds the amount, value, and sum of two thousand dollars, exclusive of interest and costs.

To the end, therefore, that your orators may have such relief as can only be granted by a court of equity, and that it may be decreed that said act of the General Assembly of Louisiana of 1870, extra session, No. 71, is unconstitutional, null, and void, and that the said defendant, The Board of Flour Inspectors of the City and Port of New Orleans, and its members may be enjoined and restrained from enforcing said act as against your orators by demanding any inspection of flour imported or brought to the port of New Orleans by your orators or by any of them; from demanding from any of your orators, or suing any of your orators for, any fees of compulsory inspection established by said law; that a restraining order and injunction may issue herein *pendente lite* to the said effect, and that said injunction may be made perpetual, and that such other and further and general relief may be granted as may be just, and that your orators may recover costs—

May it please your honors to grant to your orators writs of subpœna under the seal of this court, addressed to the said Board of Flour Inspectors of the City and Port of New Orleans, through Louis A. De Poincy, its president, as well as to said members, Louis A. De Poincy, Michael J. Hodgins, Jeremiah F. Shaw, Leonard Franz, and Patrick A. Looby, *condemning* them and each of them, at a time duly fixed, to appear and answer the premises (but not under oath) and to abide and perform the decrees of this court herein.

And your orators will ever pray, etc.

(Signed) HOWE & PRENTISS,
Solicitor for Complainants.

(Signed) W. W. HOWE, *Of Counsel.*

10 U. S. OF AMERICA, *ss:*

Jacques Trautman and J. Henry Lafaye, of New Orleans, being duly sworn, say and each for himself says that they are two of the complainants herein, and that the foregoing bill of complaint is true of their own knowledge except as to the matters therein stated on information and belief, and as to those matters they believe it to be true.

(Signed) JAC. TRAUTMAN.
J. HY LAFAYE.

Sworn to and subscribed before me this 15th day of June, A. D. 1891.

(Signed) GEO. C. PRÉOT, *Not. Pub.*

Rule for Injunction.

Entered and filed June 15, 1891.

BOOTH F. GLOVER *et al.*
vs.
THE BOARD OF FLOUR INSPECTORS, &c., *et als.* } No. 12011.

On reading and filing the bill of complaint herein and on motion of Howe & Prentiss, solicitors for complainants—

It is ordered that the defendants show cause on Thursday, the 18th day of June, 1891, at 11 a. m., why an injunction
11 *pendente lite* should not issue in this cause as prayed for in the said bill or why such other or further order should not be made as may be just.

(Signed) DON A. PARDEE,
Circuit Judge.

Order: Continuance.

Extract from the Minutes, April Term, 1891.

NEW ORLEANS, THURSDAY, *June* 18, 1891.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge.

BOOTH F. GLOVER & *als.*
vs.
BOARD OF FLOUR INSPECTORS *et als.* } No. 12011.

On motion of counsel for the parties herein, it is ordered that the motion for an injunction set down for hearing this day be continued to Monday, June 22, 1891, at 11 a. m.

Hearing and Submission of Application for Injunction.

Extract from the Minutes, April Term, 1891.

NEW ORLEANS, MONDAY, *June* 22, 1891.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge; Hon. Edward C. Billings, district judge.

12 BOOTH F. GLOVER *et al.*
vs.
THE BOARD OF FLOUR INSPECTORS, &c., *et als.* } No. 12011.

This cause came on this day to be heard on the application of the complainants for an injunction *pendente lite*.

Present: Howe & Prentiss, solicitors for complainants; Walter H. Rogers, attorney general, State of La., for defendants.

Whereupon complainants offered bill, affidavits, and exhibits in support of their motion and defendants offered affidavits and exhibits against the same, and the cause was argued by the counsel for the parties respectively and submitted, when the court took same under advisement.

Decree Granting Injunction.

Entered and filed July 9, 1891.

United States Circuit Court, Eastern District of Louisiana, at New Orleans.

B. F. GLOVER *et al.*
vs.
BOARD OF FLOUR INSPECTORS, &c. } In Equity.

This cause came on to be heard upon a motion for an injunction *pendente lite* and was argued; whereupon, on the showing made, the court finding the equities to be with the complainants, it is ordered, adjudged, and decreed that an injunction issue pend-
13 ing the trial of this cause enjoining the defendant, The Board of Flour Inspectors of the City and Port of New Orleans, and its members, from enforcing said act of the General Assembly of Louisiana, extra session, No. 71 of 1870, as against complainants by demanding any inspection of flour imported or brought to the port of New Orleans by complainants or any of them; from demanding from complainants by suit or otherwise any fees for compulsory inspection established by said law: Provided, however, that the complainants shall give bond in the sum of ten thousand dollars ($10,000), with good and sufficient security to be approved by the clerk of this court, conditioned upon the payment of all damages resulting to the defendant in case this injunction is improvidently or improperly issued; and conditioned further that complainants shall each and all keep correct and full accounts of all flour received subject to inspection under the law aforesaid.

July 6th, 1891.

(Signed) DON A. PARDEE,
Circuit Judge.

Injunctions.

Issued July 20, 1891.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Judicial Circuit and Eastern District of Louisiana.

BOOTH F. GLOVER *et al.*
vs. No. 12011.
THE BOARD OF FLOUR INSPECTORS, etc., *et als.*

14 The President of the United States of America to the Board of Flour Inspectors for the City and Port of New Orleans, through Louis A. De Poincy, president, and Louis A. De Poincy, Michael J. Hodgins, Jeremiah F. Shaw, Leonhard Franz, and Patrick A. Looby, Greeting:

Whereas it has been represented unto us in our said circuit court, on the part of Booth F. Glover *et al.*, in a bill in equity lately exhibited against you and each of you touching certain matters and things therein set forth:

Now, therefore, in consideration of the premises and of the allegations in said bill contained, you, the said Board of Flour Inspectors, and Louis A. De Poincy, Michael J. Hodgins, Jeremiah F. Shaw, Leonhard Franz, and Patrick A. Looby, your attorneys, and each of you are hereby commanded and strictly enjoined, under the penalty of the law, that you absolutely refrain and desist from enforcing act No. 71 of 1870, extra session of the General Assembly of the State of Louisiana, as against complainants, by demanding any inspection of flour imported or brought to the port of New Orleans by the complainants or by any of them, from demanding from any of the complainants or suing any of said complainants for any fees of compulsory inspection established by said act No. 71 of 1870, extra session of the General Assembly of the State of Louisiana, and that you remain so inhibited and enjoined until the further order of our said court in the premises.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of New
[SEAL.] Orleans, this 20th day of July, in the year of our Lord 1891.

(Signed) E. R. HUNT, *Clerk.*

15 *Marshal's Return.*

Received by U. S. marshal, New Orleans, La., July 20, '91, and on the 21st day of July, '91, I served a true copy of the within injunction on the following-named persons, to wit:

On the Board of Flour Inspectors for the City and Port of New Orleans, La., through Jeremiah F. Shaw, vice-president of said board, at their office, No. 35 Poydras St., in the city of New Orleans,

La., who informed me that Louis A. De Poincy, president, was absent at the time of said service.

On Michael J. Hodgins, by handing the same to him in person.
" Lambert Franze, " "
" Jeremiah F. Shaw, " "
" Patrick A. Looby, " "
" July 23, '91, Louis A. De Poincy, by handing the same to him in person.

Returned July 24, '91.

(Signed) J. B. DONNALLY,
U. S. Marshal,
By J. E. BOEHLER,
Dy U. S. Marshal.

Demurrer.

Filed August 3, 1891.

BOOTH F. GLOVER *et als.*)
vs.) No. 12011.
BOARD OF FLOUR INSPECTORS.)

16 The joint and several demurrer of L. A. Poincy, J. F. Shaw, Patrick Looby, L. Franz, and M. J. Hodgins, composing the board of flour inspectors, and, as said board, the defendants in the bill of complaint of Booth F. Glover and others.

These defendants, not confessing any of the matters in and by said bill complained of to be true in manner and form as the same are set forth, severally say that they are advised that there is no matter or thing in said bill good and sufficient in law to call these defendants to account to this honorable court for the same, and they do demur thereto.

That said bill contains no matter of equity whereon this court can ground any decree or give complainant any relief as against these defendants. Wherefore — for divers other errors in said bill contained and appearing on the face thereof these defendants do demur thereto and pray the judgment of this honorable court whether they ought to make further answer thereto otherwise than as aforesaid, and they pray to be hence dismissed with their costs and charges in this behalf sustained.

(Signed) W. H. ROGERS,
Att'y Gl of La., for Def'ts.

L. A. Poincy, being duly sworn, says he is one of the def'ts and that the said demurrer is not interposed for delay.

(Signed) L. A. POINCY.

Sworn to and subscribed before me this 3rd day of August, 1891.

(Signed) HENRY L. GARLAND, JR.,
[L. S.] *Notary Public.*

I, W. H. Rogers, solicitor for def'ts, do certify that this demurrer is well founded in law.

(Signed) W. H. ROGERS.

17 *Extract from the Chancery Order Book: Demurrer Filed Aug. 3, 1891.*

B. F. GLOVER *et als.*
vs.
BOARD OF FLOUR INSPECTORS. } No. 12011.

L. A. Poincy, J. F. Shaw, Patrick Looby, L. Franz, and M. J. Hodgins, composing the board of flour inspectors, and the said board of flour inspectors, through W. H. Rogers, solicitor, have this day filed a demurrer to the complainant's bill herein.

Injunction to the Board of Flour Inspectors.

Issued August 19th, 1891.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Judicial Circuit and Eastern District of Louisiana, New Orleans Division.

BOOTH F. GLOVER *et al.*
vs.
THE BOARD OF FLOUR INSPECTORS, etc., *et als.* } No. 12011.

The President of the United States of America to the Board of Flour Inspectors for the City and Port of New Orleans, through Louis A. De Pomey, president, Greeting:

Whereas it has been represented unto us in our said circuit court on the part of Booth F. Glover *et al.*, in a bill in equity
18 lately exhibited against you and each of you touching certain matters and things therein set forth:

Now, therefore, in consideration of the premises and of the allegations in said bill contained, you the said Board of Flour Inspectors, your attorneys, and each of you are hereby commanded and strictly enjoined, under the penalty of the law, that you absolutely refrain and desist from enforcing act No. 71 of 1870, extra session of the General Assembly of the State of Louisiana, as against complainants, by demanding any inspection of flour imported or brought to the port of New Orleans by the complainants or by any of them, from demanding from any of the complainants or suing any of said complainants for any fees of compulsory inspection established by said act No. 71 of 1870, extra session of the General Assembly of the State of Louisiana, and that you remain so inhibited and enjoined until the further order of our said court in the premises.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of New [SEAL.] Orleans, this 19th day of August, in the year of our Lord 1891.

(Signed) E. R. HUNT, *Clerk*,
By H. J. CARTER, *Dy Clerk*.

Marshal's Return.

Received by U. S. marshal, New Orleans, La., Aug. 19th, '91, and on the 22d day of Aug't, '91, I served a true copy of the within injunction on the Board of Flour Inspectors for the City and 19 Port of New Orleans, through Louis A. De Poincy, president thereof, by handing the same to him, in person, in the city of New Orleans, and leaving the same in his hands.

(Signed) J. B. DONNALLY,
U. S. Marshal,
By J. E. BOEHLER,
Dy U. S. Marshal.

Demurrer Set Down for Argument.

Extract from Chancery Order Book.

FRIDAY, *August* 28, 1891.

B. F. GLOVER *et al.*)
vs.) No. 12011.
BOARD OF FLOUR INSPECTORS & *al.*)

Now come complainants, through Howe & Prentiss, their solicitors, and set down for argument the demurrer filed by the defendants herein.

Petition of Jonté Equen, Praying to be Made a Party Complainant, &c.

Filed Oct. 31, 1891.

U. S. Circuit Court, Eastern District of Louisiana.

BOOTH F. GLOVER *et al.*)
vs.) No. 12011. In Equity.
THE BOARD OF FLOUR INSPECTORS, &c.)

20 To the hon. the judges of the court:

The petition of Jonte Equen, of the city of New Orleans, respectfully shows that the bill of complainant in this cause was filed on behalf of all persons similarly situated with the complainants; that petitioner was at the time the bill was filed and now is similarly situated, being an importer of flour from the State of Missouri and elsewhere to New Orleans, and having an interest in this controversy

exceeding twenty-five hundred dollars, exclusive of interest and costs.

It was intended that petitioner should be included in the list of complainants in this cause, and his name was omitted by error and he has contributed his legal share of the expenses of this suit.

He adopts all the allegations of the bill herein, and he asks to be admitted and made a complainant herein, and that he have the benefit of the injunction heretofore issued in this cause and the same relief as that accorded to the other complainants, and for general relief.

(Signed) HOWE & PRENTISS,
Sol'rs for Petitioner.

U. S. OF AMERICA, *ss:*

Jonte Equen, of New Orleans, being duly sworn, says that the foregoing petition is true and correct.

JONTE EQUEN.

21 Sworn to and subscribed before me, a duly qualified notary public in and for the parish of Orleans, State of Louisiana, at New Orleans, this 30th day of October, A. D. 1891, as witness my hand and seal.

[L. S.] (Signed) JNO. J. WARD, *Not. Pub.*

Order.

Let this petition be filed and the petitioner, Jonte Equen, be admitted as a complainant in this cause, and let the defendants be enjoined as to him by an order of same tenor as the injunction issued heretofore in this cause upon his furnishing a bond in the sum of one thousand dollars, conditioned as the one heretofore filed herein.

Oct. 30th, 1891.

(Signed) DON A. PARDEE, *Judge.*

Amendment to Bill of Complaint.

Filed October 31, 1891.

U. S. Circuit Court, Eastern District of Louisiana.

BOOTH F. GLOVER *et al.*
vs.
THE BOARD OF FLOUR INSPECTORS, &c. } In Equity. No. 12011.

22 And now come complainants, including Jonte Equen, made a complainant by order of the court, and with leave of the court amend their bill of complaint and aver—

That the so-called inspection provided by the act No. 71 of 1870, extra session, complained of herein, is not in anywise an exercise in good faith of any police power, but is merely illusory, and as

provided by said statute and thereunder exercised is simply a method of imposing a borden or tax of two cents a barrel on wheat flour imported to New Orleans.

The method of the defendants is substantially as follows: About ten per centum of the barrels are bored and inspected. If these are satisfactory nothing more is done, save to demand a fee of two cents a barrel on each and all of the lot. Should any of the tithe be considered unsound consignee is notified. If consignee demands further examination it is made; if not, the defendants do nothing further, but the flour goes to the importer to be sold on its merits. Even if found unsound on first or subsequent inspection the flour is not marked as "unsound" or "rejected" or otherwise, nor is it destroyed, nor is the public in any way warned against it, nor does the law make any provision for warning the public against any unsound flour or for destroying it.

And complainants pray as they have heretofore prayed and for general relief.

(Signed) HOWE & PRENTISS,
Sol'rs for Compl'ts.

Let the foregoing amendment be allowed and filed.
N. O., Octo. 30, 1891.
(Signed) DON A. PARDEE, *Judge.*

23 *Injunctions on Part of Amended Bill.*

Issued 31 October, 1891.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Judicial Circuit and Eastern District of Louisiana.

BOOTH F. GLOVER *et als.*
vs.
THE BOARD OF FLOUR INSPECTORS *et als.* } No. 12011.

The President of the United States of America to the Board of Flour Inspectors for the City and Port of New Orleans, through Louis A. De Poincy, president, and Louis A. De Poincy, Michael J. Hodgins, Jeremiah F. Shaw, Leonhard Franz, and Patrick A. Looby, Greeting:

Whereas it has been represented unto us in our said circuit court on the part of Jonte Equen in an amended bill in equity lately exhibited against you and each of you touching certain matters and things therein set forth:

Now, therefore, in consideration of the premises and of the allegations in said bill contained, you, the said Board of Flour Inspectors and Louis A. De Poincy, Michael J. Hodgins, Jeremiah F. Shaw, Leonard Franz, and Patrick A. Looby, your attorneys and each of you, are hereby commanded and strictly enjoined, under

the penalty of the law, that you absolutely refrain and desist from enforcing act No. 71 of 1870, extra session of the General Assembly of the State of Louisiana, as against Jonte Equen, complainant, by demanding any inspection of flour imported or brought to the port of New Orleans by the complainant, from demanding from
24 said complainant or suing him for any fees of compulsory inspection established by said act No. 71 of 1870, extra session of the General Assembly of the State of Louisiana, and that you remain so inhibited and enjoined until the further order of our said court in the premises.

Witness the Honorable Melville W. Fuller, Chief Justice of the
[SEAL.] Supreme Court of the United States, at the city of New Orleans, this 31 day of October, in the year of our Lord 1891.

(Signed) E. R. HUNT, *Clerk.*

Marshal's Return.

Received by U. S. marshal, New Orleans, La., Oct. 31, '91, and on the same day I served a true copy of the within injunction on the following-named persons, to wit:

On the Board of Flour Inspectors for the City and Port of New Orleans, La., through Louis A. De Poincy, president, by handing the same to him in person, at his office, No. 33 Poydras St., in the city of New Orleans, and leaving the same in his hands.

On Louis A. De Poincy, by handing the same to him in person.
" Michael J. Hodgins, " "
" Leonard Franz, " "
" Patrick A. Looby, " "
" Nov. 19, '91, Jeremiah F. Shaw, by handing the same to him in person.

(Signed) J. B. DONNALLY,
U. S. Marshal,
By J. E. BOEHLER,
Dy U. S. Marshal.

25 *Order Fixing Demurrer.*

Extract from the Minutes, November Term, 1891.

NEW ORLEANS, MONDAY, *November* 16, 1891.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

BOOTH F. GLOVER *et al.*
vs.
THE BOARD OF FLOUR INSPECTORS *et al.* } No. 12011.

On motion of Howe & Prentiss, solicitors for complainants—

Ordered that the demurrer herein be set down for Saturday, the 21st of November, 1891, at 11 a. m.

Hearing & Submission.

Extract from the Minutes, November Term, 1891.

NEW ORLEANS, SATURDAY, *November* 21, 1891.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

BOOTH F. GLOVER *et als.*
vs.
BOARD OF FLOUR INSPECTORS *et als.* } No. 12011.

This cause came on this day to be heard on the demurrer filed by defendants to the bill and amended bill of complaint—W. W. Howe appearing for complainants, J. R. Beckwith for de-
26 fendants—and was argued by counsel and submitted, when the court took time to consider.

Decree Overruling Demurrer.

Entered and filed Dec. 14, 1891.

Circuit Court of the United States, Eastern District of Louisiana.

B. F. GLOVER *et als.*
vs.
BOARD OF FLOUR INSPECTORS *et als.* } No. 12011. In Equity.

This cause came on to be heard on the bill and amended bill of complaint and the demurrer filed by the defendants thereto, and was argued by the solicitors for the parties respectively; whereupon and on consideration thereof, for the reasons assigned in the written opinion on file, it is ordered that the demurrer be, and the same is hereby, overruled, and that defendants have the time until next rule day in which to file an answer.

(Signed) EDWARD C. BILLINGS, *Judge.*

New Orleans, Dec. 14, 1891.

Statement of Defendants to Stand upon Their Demurrer and Petition.

Filed Dec. 23, 1891.

Circuit Court of the United States for the Eastern District of Louisiana, *ss:*

B. F. GLOVER *et al.*
v.
THE BOARD OF FLOUR INSPECTORS FOR THE CITY OF NEW ORLEANS *et al.* } No. 12011. In Equity.

27 The said defendants herein, by their said solicitors of record, now come and say that as the only question made by the bill of complaint herein is the validity of the act of legisla-

ture of the State of Louisiana assailed in the bill of complaint herein, and as the question of its repugnancy to the Constitution of the United States must be determined by a construction of the Federal Constitution and the said act of legislature itself by its text and not by any pretended maladministration thereof, as alleged in said bill of complaint as amended, they stand upon their said demurrer therein as raising and presenting all of the questions of law legitimately involved in the bill of complaint or by the prayer for relief therein, and, as the effect and operation of the injunction herein is to stay and obstruct public service, they desire a speedy determination of this cause and the questions of law involved therein, believing all of said questions to be fully raised by the said demurrer, and that the same cannot be modified or varied by proof or evidence either in behalf of the complainants or the defendants herein, ask the court to consider this cause and make such decree herein as it may deem just in order that there may be a speedy review thereof in the appellate court of last resort having jurisdiction herein.

(Signed) J. R. BECKWITH,
Sol. for Def'ts.
W. H. ROGERS,
Att'y Gl, for Def'ts.

Final Decree.

Entered and filed January 25, 1892.

28 BOOTH F. GLOVER *et al.*
vs.
THE BOARD OF FLOUR INSPECTORS *et als.* } No. 12011.

Final decree.

This cause came on to be further heard on the pleadings and proceedings heretofore filed and had and on the petition or statement filed herein by the defendants on the 23rd day of December, 1891, whereby they declared that they would abide by their demurrer and requested the court "to consider the cause and to make such decree herein as it may deem just," and was argued by counsel.

And it appearing that the demurrer of defendants was overruled and they declined to further plead, but stood on said demurrer and made the request aforesaid, admitting the truth of all the matters of fact pleaded in the bill and its amendments, in consideration whereof—

It is now ordered, adjudged, and decreed that the injunction granted herein *pendente lite* and issued on the 20th day of July, 1891, and the 31st October, 1891, be, and the same is hereby, perpetuated as hereinafter set forth, and accordingly that the defendants be, and they hereby are, perpetually enjoined from enforcing against the complainants or any of them the act No. 71 of the extra session of the General Assembly of Louisiana of the year 1870 by demanding any inspection of flour imported to the port of New

Orleans for sale by the complainants from States of the United States other than Louisiana or from foreign countries, and from demanding from any of the complainants or suing any of them for any fees of compulsory inspection of such flour under said
29 act No. 71 of 1870, extra session.

And it is further ordered that the complainants do have and recover from the defendants the costs of this suit, which have been taxed at the sum of one hundred and seventy-eight dollars and twelve cents.

Thus done and signed in open court, at New Orleans, this 25th day of January, A. D. 1892.

(Signed) EDWARD C. BILLINGS, *Judge.*

Assignment of Error.

Filed February 8th, 1892.

United States Circuit Court for the Eastern District of Louisiana.

BOOTH F. GLOVER and Others
vs.
BOARD OF FLOUR INSPECTORS *et al.* } No. 12011.

And now come the said defendants, by their said solicitor, and assign as error herein:

1.

That the circuit court erred in overruling the defendants' demurrer.

30 2.

That the circuit court erred in adjudging the act of the legislature of the State of Louisiana referred to and assailed in the bill herein to be void for repugnancy to the Federal Constitution.

(Signed) J. R. BECKWITH,
Sol'r for Def'ts.

Motion and Order Granting Appeal.

Entered and filed January 26, 1892.

Circuit Court of the United States, Eastern District of Louisiana.

BOOTH F. GLOVER *et al.*
vs.
THE BOARD OF FLOUR INSPECTORS *et al.* } No. 12011.

On motion of J. R. Beckwith and Walter H. Rogers, solicitors for defendants, and on suggesting that the defendants believe that there is error in the final decree herein to their prejudice, the said decree having been rendered at the present term of this court, and desire to appeal—

It is ordered that the said defendants be, and are hereby, allowed and granted an appeal from said final decree to the Supreme
31 Court of the United States, returnable in the Supreme Court, at Washington, on the 25 day of February, 1892, on giving bond in the sum of two hundred dollars.

(Signed) EDWARD C. BILLINGS, *Judge.*

January 26, 1892.

Bond for Appeal.

Filed Jan'y 29, 1892.

UNITED STATES OF AMERICA:

Know all men by these presents that we, L. A. Poiney, Michael J. Hodgins, Jeremiah F. Shaw, Leonard Frantz, Patrick A. Looby, and The Board of Flour Inspectors for the City and Port of New Orleans and Lambert Frantz, of the city of New Orleans, as surety, are held and firmly bound, jointly and severally, unto Booth F. Glover and Frederick J. Odendahl, composing the firm of Glover & Odendahl;

William H. Matthews and George B. Mathews, composing the firm of Wm. H. Matthews & Bro.;

Woodward, Wight & Co., Limited, a mercantile corporation created under the laws of the State of Louisiana;

Jacques Trautman and Joseph Trautman, composing the firm of Jac. Trautman & Co.;

J. & M. Schwabacher & Co., Limited, a corporation of Louisiana;

Michael A. Rogers;

Smith Brothers & Co., Limited, a corporation of Louisiana;

William Cameron and John W. Castles, composing the
32 firm of Cameron & Castles;

Abraham Adler and William Adler, composing the firm of A. Adler & Co.;

Hugh McCloskey and Patrick McCloskey, composing the firm of McCloskey Brothers;

William B. Schmidt and Francis S. Ziegler, composing the firm of Schmidt & Ziegler;

Henry T. Cottam and Prudent Mailard, composing the firm of H. T. Cottam & Co.;

Leroy A. Goddard and John E. Hall, composing the firm of Goddard & Hall, of N. O.;

The Chambers-Roy Company, Limited, a corporation of Louisiana;

Henry Lochte and William E. Murtagh, composing the firm of Henry Lochte & Co.;

Henry R. Cogreve;

Simon Pfeiffer and Ariel B. Newman, composing the firm of S. Pfeiffer & Co.;

William Flash, Henry Preston, and Isaac H. Stauffer, Jr., composing the firm of Flash, Preston & Co.;

The Nicholas Burke Co., Limited, a corporation of Louisiana;
Charles B. Buddecke;
Lazard Goudchaux and Albert M. Silbernagel, composing the firm of Goudchaux & Silbernagel;
Edward Feibelman, Thomas F. Feibelman, Jacob Feibelman, and Joseph Cohn, Jr., composing the firm of E. Feibelman, Sons & Co.;
Frank J. Levis and August Levis, composing the firm of Levis Brothers;
John M. Parker, Sr., John M. Parker, Jr., and William J. Montgomery, composing the firm of John M. Parker & Co.;
Thomas H. Watson;
33 James Miltenberger and Iveson G. Flower, composing the firm of Miltenberger & Flower;
Henry Kahn and Lazard Levy, composing the firm of Kahn & Levy;
Jerome B. Van Horn;
J. Henry Lafaye;
Albert Mackie;
Jonte Equen;
in the sum of two hundred dollars, lawful money of the United States of America, to be paid to the said above-named obligees, their successors as above set forth, their heirs, executors, administrators, and assigns; for which payment, well and truly to be made, we bind ourselves and each of us by himself and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the 27th day of January, in the year of our Lord eighteen hundred and ninety-two.

Whereas the said above-named obligors, being the principal obligors herein, having heretofore, to wit, on the — day of January, 1892, taken an appeal to the Supreme Court of the United States from and to reverse the decree rendered on the 25th day of January, 1892, by the circuit court of the United States for the fifth circuit, holding sessions in and for the district of Louisiana, in the suit of Booth F. Glover and others, wherein all of the said above-named obligees are complainants *vs.* the said defendants therein, the above-named principal obligors, No. 12011 of the docket thereof:

Now, the condition of the above obligation is that if the above-bounden defendants in said suit and principal obligors in this bond shall prosecute their said appeal to effect and shall answer all damages and costs if they shall fail to make good — plea, then this obligation shall be void; otherwise to remain in full force
34 and virtue.

(Signed) THE BOARD OF FLOUR INSPECTORS OF CITY & PORT OF N. O.,
L. A. DE POINCY,
M. J. HODGINS,
J. F. SHAW,
LEONARD FRANTZ, &
PATRICK A. LOOBY,
By J. R. BECKWITH, *Their Sol.* [L. S.]
(Signed) LAMBERT FRANZ. [L. S.]

Signed, sealed, and delivered in the presence of—
(Signed) J. R. BECKWITH.

I certify that the surety L. Frantz is solvent of my knowledge.
(Signed) J. R. BECKWITH.

Bond and sufficiency of surety approved.
Jan'y 29th, 1892.
(Signed) EDWARD C. BILLINGS, *Judge.*

35 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to Booth F. Glover and Frederick J. Odendahl, composing the firm of Glover & Odendahl; William H. Matthews and George B. Matthews, composing the firm of Wm. H. Matthews & Bro.; Woodward, Wight & Co., Limited, a mercantile corporation created under the laws of the State of Louisiana; Jacques Trautman and Joseph Trautman, composing the firm of Jac. Trautman & Co.; J. H. M. Schwabacher & Co., Limited, a corporation of Louisiana; Michael A. Rogers; Smith Bros. & Co., Limited, a corporation of Louisiana; William Cameron and John W. Castles, composing the firm of Cameron & Castles; Abraham Adler and William Adler, composing the firm of A. Adler & Co.; Hugh McCloskey and Patrick McCloskey, composing the firm of McCloskey Brothers; William B. Schmidt & Francis S. Ziegler, composing the firm of Schmidt & Ziegler; Henry T. Cottam and Prudent Mallard, composing the firm of H. T. Cottam & Co.; Leroy A. Goddard and John E. Hall, composing the firm of Goddard & Hall, of N. O.; The Chambers-Roy Company, Limited, a corporation of Louisiana; Henry Lochte and William E. Murtagh, composing the firm of Henry Lochte & Co.; Henry R. Gogreve; Simon Pfeiffer and Ariel B. Newman, composing the firm of S. Pfeiffer & Co.; William Flash, Henry Preston, and Isaac H. Stauffer, Jr., composing the firm of Flash, Preston & Co.; The Nicholas Burke Co., Limited, a corporation of Louisiana; Charles B. Buddecke; Lazard Goudchaux and Albert M. Silbernagel, composing the firm of Goudchaux & Silbernagel; Edward Feibelman, Thomas F. Fiebelman, Jacob Feibelman, and Joseph Cohn, Jr., composing the firm of E. Feibelman, Sons & Co.; Frank J. Levis and August Levis, composing the firm of Levis Brothers; John M. Parker, Sr., John M. Parker, Jr., and William J. Montgomery, composing the firm of John M. Parker & Co.; Thomas H. Watson; James Miltenberger and Iveson G. Flower, composing the firm of Miltenberger & Flower; Henry Kahn and Lazard Levy, composing the firm of Kahn & Levy; Jerome B. Van Horn, J. Henry Lafaye, Albert Mackie, Jonte Equen, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of

Washington, on the 25th day of February, 1892, pursuant to a motion and order for appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein L. A. Poincy, Michael J. Hodgins, Jeremiah F. Shaw, Leonard Frantz, Patrick A. Looby, and The Board of Flour Inspectors for the Port of New Orleans are appellants and you are appellees, to show cause, if any there be, why the judgment rendered against the said L. A. Poincy, Michael J. Hodgins, Jeremiah F. Shaw, Leonard Frantz, Patrick A. Looby, and The Board of Flour Inspectors for the Port of New Orleans, as in said motion mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 4 day of February, in the year of our Lord one thousand eight hundred and ninety-two.

EDWARD C. BILLINGS, *Judge.*

36 [Endorsed:] United States circuit court, eastern district of Louisiana. No. 12011. Booth F. Glover *et als. vs.* The Board of Flour Inspectors *et als.* Citation of appeal. Marshal's return. Received by U. S. marshal, New Orleans, La., Feb'y 4, '92.

Before the undersigned authority this day personally came and appeared James R. Pennigre, deputy U. S. marshal for the eastern district of Louisiana, who, being duly sworn, deposes and says that the within citation of appeal, together with a certified copy thereof, was received by the U. S. marshal for service on Thursday, February 4th, A. D. 1892; that said copy was served on said fourth day of February, 1892, on Messrs. Howe & Prentiss, att'ys of record, by handing same to Hon'l. W. W. Howe, a member of said firm, in person, at the office of Mess. Howe & Prentiss, att'ys of record, in New Orleans, Louisiana, and leaving same with him.

JAMES R. PENNIGRE,
Dy U. S. Marshal.

Sworn to and subscribed before me this 4th day of February, A. D. 1892.

(Seal U. S. Circuit Court for the 5th)
(Circuit & Eastern District of La.)

E. R. HUNT, *Clerk.*

[Endorsed:] No. —. U. S. circuit court, eastern district of Louisiana, New Orleans division. Filed Feb'y 6, 1892. E. R. Hunt, clerk.

37 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby

certify that the foregoing 34 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial of the case of Booth F. Glover *et als. vs.* The Board of Flour Inspectors of the Port of New Orleans *et als.*, No. 12011 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 9 day of February, A. D. 1892.

Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.

E. R. HUNT, *Clerk*.

I, Edward C. Billings, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was at the time of signing said certificate and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 9 day of February, A. D. 1892.

EDWARD C. BILLINGS, *Judge*.

38 *Opinion on Demurrer.*

Filed December 12, 1891.

United States Circuit Court, Eastern District of Louisiana.

BOOTH F. GLOVER *et als.*
vs.
THE BOARD OF FLOUR INSPECTORS, etc. } No. 12011.

Before Billings, judge.

The question in this case is presented by a demurrer to an injunction bill in equity. The plaintiffs are dealers in flour. The defendants are inspectors of flour. The bill is aimed at the statute under which the defendants are appointed. The question is whether, under the Constitution of the United States, that statute is an unathorized interference with or an unwarranted regulation of interstate and foreign commerce. That statute is found in No. 71 of the Acts of the Extra Session of 1870, at page 156.

The statute is entitled "An act to amend and re-enact an act entitled 'An act to establish a board of flour inspectors for the city and port of New Orleans,' approved March 28, 1867, and numbered 159" (Acts of 1867, p. 296).

That statute authorizes the governor, with the advice and counsel of the senate, to appoint a board of flour inspectors of the city and port of New Orleans. They are required to inspect all flour

imported or coming to the port of New Orleans for sale solely for the purpose of ascertaining its purity and soundness and whether of lawful weight, but not for the purpose of classification and grading.

They are to brand each barrel of sound and full-weight flour and not to brand any other flour, such examination to be on the levee or in the warehouse, as the receiver may elect. It is declared not to be lawful to sell any flour as sound and merchantable unless the same is branded. The fee of the inspector is fixed at two cents per barrel.

This incompleteness of this statute, in that it provides for no examination of flour which shall come into any other port of Louisiana than the city or port of New Orleans, and its inefficiency as a means of securing sound, pure, and full-weight flour, in that it imposes no penalty and simply makes it "unlawful to sell flour as sound and merchantable" unless it has on it the official brand, are manifest. These imperfections could be considered by the legislature of the State alone.

The grave objection to the statute is that it applies only to flour imported or coming to the city of New Orleans "for sale." The citizen of Louisiana bringing in either from another State or from abroad flour for his own use or consumption need have no inspection—need pay no tax. The citizen of Missouri or any other State who brings in his flour for sale must have inspection and must pay a tax.

Does this statute create such an inequality either in its terms or by its necessary operation as brings it within the line of unconstitutional laws as defined and expounded in the case of Brimmer *vs.* Pitman, 138 U. S. R., pp. 78, 82, and the cases there referred to?

This is a question not easy to determine. It is a question most proper for the Supreme Court. It is possible that the proofs which will be offered as to the manner in which the law was enforced may aid this and the appellate court in the consideration of the cause. The circuit judge, when he granted the injunction, seems to have dealt with the question guardedly, and required a bond which will amply protect the defendants until the end of the litigation in case injunction should in the court of last resort be dissolved; or, if the bond already given is not ample, application may be made for a further bond.

The argument for the validity of the statute of 1870 comes from the reservation in the Constitution to the States to impose taxes absolutely necessary for the execution of inspection laws. Act 1, sec. 10, paragraph 2. For, while aimed at protecting only the pocket of the community and not at the protection of its health and imperfect as to locality and inefficient because lacking sanctions or penalties, it is nevertheless an inspection law. On the other hand, there is the argument that the statute in substance and necessary operation, while laying a burden upon interstate commerce, lays it unequally upon the domestic citizen and the importer who is a citizen of another State.

On the whole, I am of the opinion that I should overrule the demurrer and let the statute and such facts as the proofs may establish as to the necessary operation of the statute come before the court to be dealt with upon the final hearing and in the appellate court.

Endorsed on cover: Case No. 14,975. E. Louisiana C. C. U. S. Term No., 369. The Board of Flour Inspectors for the Port of New Orleans *et al.*, appellants, *vs.* Booth F. Glover & Frederick J. Odendahl, composing the firm of Glover & Odendahl, *et al.* Filed February 12th, 1892.

SUPREME COURT OF THE UNITED STATES.

October Term, 1895.

No. 88.

THE BOARD OF FLOUR INSPECTORS, Etc.

versus

BOOTH F. GLOVER Et Al.

UNITED STATES CIRCUIT COURT,

Eastern District of Louisiana.

BOOTH F. GLOVER Et Al.
vs.
THE BOARD OF FLOUR INSPECTORS Et Als. } No. 12,011.

[Now on Appeal in the Supreme Court of the U. S., No. 88, October Term, 1895.]

In order to correct clerical errors in Transcript of Record, it is hereby certified, that, in the original Bill of Complaint in this cause, the first sentence of the second clause of the fourth paragraph (printed Transcript, foot of p. 3), reads as follows:

"That such Interstate Commerce in Flour is also largely carried on from said points and places in other States, such as St. Louis, Missouri, and other places, *into* Louisiana,—by importations made from said points in other States than Louisiana, directly, to ports *and* markets within Louisiana, for sale and consumption, by river and rail, other than New Orleans; such as Plaquemine, Bayou Goula, Baton Rouge, Bayou Sara, Opelousas, Alexandria, Monroe, Shreveport, and other markets; and such importations amount to at least 100,000 barrels per annum; but there is no act, law or ordinance requiring or establishing any inspection of such flour, or any inspection fees on such flour; or on any flour manufactured in any part of the State of Louisiana."

In witness whereof, I have hereunto set my hand and seal of office, at New Orleans, this 15th October, 1895.

[SEAL] E. R. HUNT, *Clerk.*

It is hereby stipulated that the Transcript of Record in this cause may be corrected, on its face, or otherwise, in conformity with the foregoing certificate.

W. W. HOWE,
For Appellees.

J. R. BECKWITH,
For Appellants.

160-170

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 88.

THE BOARD OF FLOUR INSPECTORS FOR THE PORT OF NEW ORLEANS, APPELLANT.

versus

BOOTH F. GLOVER AND FREDERICK ODENDAHL, CO-PARTNERS, ET AL., APPELLEES.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

APPELLANT'S BRIEF.

J. R. BECKWITH,
Counsel for Appellant.

A. W. HYATT STATIONERY M'F'G CO., LTD., 73 CAMP ST.—70,576.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 88.

THE BOARD OF FLOUR INSPECTORS FOR THE PORT OF NEW ORLEANS, APPELLANT.

versus

BOOTH F. GLOVER AND FREDERICK ODENDAHL, CO-PARTNERS, ET AL., APPELLEES.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

APPELLANT'S BRIEF.

STATEMENT OF PLEADINGS.

The only question involved in this cause is the validity of the flour inspection laws of Louisiana, providing for flour inspection in New Orleans.

The bill seems to contain averments somewhat discordant with each other, but in substance avers that the plaintiffs are dealers in flour in New Orleans; of the character, both as to flour dealt in and manner of dealing, subjecting it to the action of the inspection laws, and to inspection fees, chargeable if the law requiring inspection is valid.

Plaintiffs aver anxiety for collective and individual prosperity—claim that both are imperilled by the operation of the inspection regulations contained in an act of the General Assembly of Louisiana, adopted March 16, 1870, being Act No. 71 of the acts of an

extra session of that year. The bill attempts a statement of the provisions of that act, which, we believe, in some respects, mistaken and incorrect, a question only to be determined by an inspection of the act itself, which is given at large in the brief.

It is averred that flour subject to inspection by the act, comes from other States than Louisiana, as well as from places other than New Orleans in the State of Louisiana, and is sold in New Orleans for consumption and export, that New Orleans is the only point in the State where inspection is made compulsory. (The legislative reason probably being that New Orleans is the only general flour market and port of export in the State.)

That the inspection act of 1870 is void, for repugnance to the Federal Constitution is averred with several alleged reasons, substantially the following:

1. It is local as to New Orleans.

2. That it imposes inspection and fees on flour consigned to New Orleans not imposed on the same article sent direct to rural parts of the State.

3. That the act is practically an import duty on flour imported into New Orleans not imposed on flour milled in New Orleans.

4. That the Act of 1870 regulates commerce between the States.

The excuse for uniting the plaintiffs in the same bill is to avoid multiplicity of suits.

The bill was filed June 15, 1891. On August 28 was amended in an immaterial matter in so far as the question of validity of the statute in dispute is concerned. (Record 12).

Motion for injunction *pendente lite* was heard and allowed on a bond for $10,000.00. (Record 8).

The bill was met by the State through the Attorney General with a general demurrer. (Record 10).

This demurrer was overruled.

The defendants came into Court, and stating that the bill only involved a question of law, informed the Court that they would

stand on their demurrer, whereupon there was a decree sustaining the bill declaring the State inspection law null and void and granting the relief prayed for with costs.

From that decree this appeal is taken by the defendants in the bill and decree.

ASSIGNMENT OF ERROR.

The error assignment is :

1. The Court erred in overruling the demurrer.

2. The Court erred in adjudging the inspection laws of Louisiana void for repugnance to the Federal Constitution.

The only question involved is whether the act of legislature assailed is valid state legislation.

ARGUMENT AND AUTHORITIES.

The act assailed is Act No. 71 of the Acts of 1870 (extra session). *Act of 1870, page 156, et seq.* So much of the act as is material to the question involved is given below.

The first section authorized the appointment of five flour inspectors and constituted them the Board of Flour Inspectors for the port of New Orleans.

The second section provides for direction of officers and bonds for faithful performance of duty.

The third section prohibited the inspectors or their employees from trading in flour.

The fourth section provides for the organization of the board and grants power to make regulations not inconsistent with the laws of the state, and the federal laws and constitution, and for keeping accounts.

The remaining sections are as follows :

"Section 5. *Be it further enacted, etc.*, That it shall be the duty of the flour inspectors to inspect any lot or lots of flour imported in the city and port of New Orleans.

"Section 6. *Be it further enacted, etc.*, That all flour imported or coming to the port of New Orleans for sale shall be examined and inspected by the said Board of Flour Inspectors for the purpose (of) solely to ascertain its purity and soundness, and to ascertain if it is of lawful weight, but not for the purpose of clasification and grading ; and if said flour is sound, pure wheat flour and of

fully legal weight, it shall be the duty of said inspectors to put their official brand upon each barrel; but if not sound and of full weight, they shall refuse to brand it at all. Said examination may be made by said inspectors in such portions of any parcel of flour as shall satisfy them of the character of the whole; and it may be made either on the levee or wharf, or in warehouse as the owner or receiver of the flour may elect. The fee for this examination and inspection is fixed at 2 cents per barrel, whether branded or not, to be paid by the receiver or owner of the flour. It shall not be lawful to sell flour in this city and port of New Orleans as sound and merchantable, unless each barrel has the official brand of said inspectors. It shall also be the duty of said inspectors to grade and classify flour, when called upon to do so by either buyers and sellers of flour, and to brand each barrel according to such grade if called upon so to do; and they shall have the right to charge and collect an additional fee, not to exceed 2 cents per barrel, to be paid by the party demanding the inspection. An appeal may be made by any party feeling aggrieved from any decision of said flour inspectors to the committee appointed by the Chamber of Commerce whose decision shall be final; and it shall be the duty of said flour inspectors to obey and carry out said decision.

"Section 7. *Be it further enacted, etc.*, That no other person or persons shall have the right or privilege to inspect flour in the City of New Orleans, except the aforesaid Board of Flour Inspectors of the city and port of New Orleans, and when in any case the said inspectors are prevented from inspecting as aforesaid, they shall be entitled to pay as though they had made the inspection as required by law, and in all cases these fees shall be recoverable by suit in the name of the board, before any court of competent jurisdiction in the parish of Orleans.

"Section 8. *Be it further enacted, etc.*, That all flour brought to this city for consumption shall be inspected by the State inspectors, appointed by the governor, previous to its removal from the levee."

The remaining sections, 9 and 10, only provide for the repeal of conflicting laws and the date when the act shall go into effect.

This is the act assailed in the bill and declared void in the decree and opinion of the Circuit Court. Why void, does not seem apparent in the opinion which seems on the whole to only indicate doubt and uncertainty rather than any positive conviction supported by reasons other than a belief that the question should be dealt with by this Court on appeal.

It is difficult to comprehend repugnance to the Federal Constitution in any part of this act.

The bill attempts to make it repugnant to the provision of the Federal Constitution providing that "*No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except such as may be absolutely necessary for executing its inspection laws.*"

There can be no possible doubt that flour, a staple article of human food, is legitimately subjected to inspection, both in respect to its local consumption and as an article of import and export. Nothing in the list of articles dealt with in commerce can be more legitimately subjected to state inspection.

What may be classed as inspection laws under the exception in the Federal Constitution must be determined largely by the nature of the inspection laws of the states when the federal constitution was framed and adopted.

In Turner vs. Maryland, 107 U. S. 38, there is an elaborate examination of these statutes, also in a foot note appended to *Gibbons vs. Ogden, 9 Wheat. 38*.

"No doubt the primary and most usual object of inspection is to prepare goods for exportation in order to preserve the credit of our exports in foreign markets."

Nelson vs. Garza, 2 Woods (U. S.), 227.

Chief Justice Marshall, in *Gibbons vs. Ogden, 9 Wheat. 203*, says:

"The object of inspection laws is to improve the quality of articles produced by the labor of a country, to fit them for exportation, or it may be for domestic use."

And in the same case he declares that imported as well as exported goods may be subjected to inspection.

Bouvier defines inspection as the examination of certain articles made by law subject to such examination that they may be declared fit for commerce, which, of course, involves fitness for consumption as food when edible.

So much of the complaint in the bill as charges the act void as impost on imports and exports, we find nothing in the bill that charges importation from foreign ports or exports to such ports. The bill in that respect is completely disposed of by *Woodruff vs. Parham, 8 Wall. 123*. Where the prohibition on the

States as to tax on imports and exports is defined to mean imports and exports to and from foreign countries. No such pretended tax is charged in the bill.

Justice Sutherland in *Clintsman vs. Northrop, 8 Cow. (N. Y.), 46*, admirably defines the object and purpose of inspection laws. "The object of inspection laws is to protect the community so far as they apply to domestic sales from frauds and imposition; and in relation to articles designed for exportation, to preserve the character and reputation of the State in foreign markets."

The State may not only lawfully inspect a product of the soil or of labor, but can lawfully prescribe the character and description of the package in which it goes on the market. *Turner vs. Maryland*, 107 U. S. 38. In this case it was also determined that it was lawful to compel the article subject to inspection to be brought to the inspection office and not compel the officer to go to the article to inspect.

So much of the bill as attempts to impeach this state legislation finds its answer in the accepted definition of the inspection contemplated in the Federal Constitution—the protection of both, consumers at home and the reputation of the exporting locality when the article goes abroad by exportation. New Orleans is substantially the only trading seaport in the State and the point of distribution for articles of commerce going inland.

The claim of nullity by reason of supposed interference with interstate trade or its attempted regulation is disposed of in *Smith vs. Alabama, 124 U. S. 465, 473*, and in *Pittsburg Coal Co. vs. Louisiana, 156 U. S. 590*, where the statute of Louisiana requiring coal inspection was attacked more elaborately than the assault on the flour inspection act in the bill in this case.

We respectfully submit that this case is controlled, if not determined by *Pittsburg Coal Co. vs. Louisiana, 156 U. S., Louisiana 156*, and the decree of the Circuit Court should be reversed.

Respectfully submitted,

J. R. BECKWITH,

Counsel for Appellant.

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

October Term, 1895.

No. 88.

THE BOARD OF FLOUR INSPECTORS FOR THE PORT OF NEW ORLEANS
ET AL., APPELLANTS,

versus

BOOTH F. GLOVER ET AL., APPELLEES.

BRIEF ON BEHALF OF APPELLEES, WHO WERE COMPLAINANTS IN THE LOWER COURT.

WM. WIRT HOWE,
Of Counsel for Appellees.

Thomason, Print., 526 Natchez Street, N. O.

SUPREME COURT OF THE UNITED STATES.

October Term, 1895.

No. 88.

THE BOARD OF FLOUR INSPECTORS FOR THE PORT OF NEW ORLEANS ET AL., APPELLANTS,

versus

BOOTH F. GLOVER ET AL., APPELLEES.

BRIEF ON BEHALF OF APPELLEES, WHO WERE COMPLAINANTS IN THE LOWER COURT.

This is an appeal from the United States Circuit Court for the Eastern District of Louisiana. The appellants, who were the defendants in the lower court, filed a general demurrer, which is found at page 10 of the Transcript. The demurrer was overruled, page 16. Thereupon the defendants, who are appellants herein, filed a statement that they would stand upon their demurrer, the only question in the case being the validity of the Act of the Legislature of the

State of Louisiana, known as Act No. 71 of the Extra Session of 1870, and whether it is repugnant to the Constitution of the United States. They therefore asked the court to make a final decree, and such decree was made, page 17, enjoining the defendants below from enforcing against the complainants below or any of them, this Act No. 71 of the Extra Session of the General Assembly of Louisiana of the year 1870, by demanding any inspection of flour imported to the port of New Orleans for sale by the complainants, from States of the United States other than Louisiana, or from foreign countries; and from demanding of any of the complainants, or suing any of them, for any fees of compulsory inspection of such flour, under said Act. Pages 17, 18.

The only question which is raised by this appeal is whether this Act of the Legislature of Louisiana is repugnant to the Constitution of the United States. No question was raised in the lower court as to the right of the complainants to file the bill, as they did, upon the equity side of the court, nor was any such question in any way presented, argued or decided, nor is it raised here. The bill was to obtain an injunction; to prevent a great multiplicity of suits against each of the complainants, for small amounts in inferior courts; and to further prevent the great injustice and irreparable injury which must ensue from the fact that neither

under said Act of 1870, nor any other Statute of Louisiana, is there any practicable way of paying these illegal fees under protest, and then recovering the same, inasmuch as such a course would involve a further multiplicity of suits, in which, if judgment should be obtained, no practicable recovery could be had, because the defendant Board had no funds or property of any kind to respond to such judgments, nor was there any appropriation for that purpose. The subject matter of the suit belongs to the class over which a court of equity has jurisdiction. And inasmuch as no point was specially raised or passed upon in the lower court in this regard, we presume that it is not necessary to enlarge upon the question in this tribunal. See remarks in Reynes vs. Dumont, 130 U. S., at page 395; Kilbourn vs. Sunderland, *Id.*, page 514, and Wylie vs. Coxe, 15 Howard, 415.

The bill of complaint in this case was prepared and filed upon the authority of Voight vs. Wright, 141 U. S. 62, as well as such decisions as Minnesota vs. Barber, 136 U. S. 313, and Brimmer vs. Rebman, 138 U. S., page 78, and the various opinions of the Supreme Court cited in those cases, and to which we now refer. The unconstitutionality of this so-called flour inspection law of Louisiana, being the Act No. 71 of the Extra Session of 1870, is, if possible, more glaring than that of the Virginia Statute which was drawn in

the question in *Voight vs. Wright*. It may be remarked also that the Virginia Statute was repealed while the case was pending in this Court, and the Louisiana Statute has suffered the same fate. As soon as possible, after the decision here appealed from had been rendered, the Legislature of Louisiana passed Act No. 23 of 1892, Session Acts, page 34, in the following terms:

"Be it enacted by the General Assembly of the State of Louisiana, That the Act No. 71 of 1870, Extra Session, approved March 16th, 1870, and entitled 'An Act to amend and re-enact an Act entitled an Act to establish a Board of Flour Inspectors for the City and port of New Orleans, approved March 28th, 1867, and numbered 159,' *be and the same is hereby repealed;* and that henceforth there shall be no compulsory inspection of any flour in Louisiana."

The demurrer in the case at bar admitted the truth of all the allegations of fact well pleaded in the bill, and these facts, with their legal results, may be summed up as follows:

I.

The complainants are each large importers of wheat flour from St. Louis and other cities of the northwest to New Orleans. Such importations amount to about 600,000 barrels per annum, the bulk of which is thus imported by the complainants. It is manifest that in

the competitions of modern commerce an imposition of two cents per barrel, if illegal, is an important matter. On the face of the statute and its application in the actual facts of the business of importing such an important article and jobbing it out to their customers in the markets of the State, the complainants are confronted with two remarkable facts:

(1) As in *Voight vs. Wright*, no such imposition is made on wheat flour manufactured in Louisiana. Yet it is shown by the bill, p. 4, that in 1880 there were 88 grist-mills in Louisiana, and upwards of one-third of their product (on a capacity of 11,000 bushels per day) was wheat flour; and it is averred on the belief of complainants that, under the census of 1890, the amount so produced in the State was still larger. On this home product, which necessarily competes with the flour imported by complainants, there is no requirement of inspection. Under the decision in *Voight vs Wright* this fact is fatal.

(2) But this is not all. Another element of illegality is found in this statute which was not present in *Voight vs. Wright*. It is averred in the bill and admitted by the demurrer, "that such interstate commerce in flour is also largely carried on from said points and places in other States, such as St. Louis, Mo., and other places, by importations made from said points, in other States than Louisiana, directly to

ports and markets within Louisiana, for sale and consumption, by river and rail, *other than New Orleans*, such as Plaquemine, Bayou Goula, Baton Rouge, Bayou Sara, Opelousas, Alexandria, Monroe, Shreveport and other markets, and such importations amount to at least one hundred thousand barrels per annum; but there is no act, law or ordinance requiring or establishing any such inspection on such flour, or any inspection fees on such flour." It results that the compulsory inspection and fees of two cents per barrel, imposed by the Act of 1870, are imposed as a burden only on flour brought from without the State to New Orleans, for sale or consumption, and are imposed chiefly on flour imported by the complainants, to the great injury of the business of each of them.

This admitted discrimination brings the case also within the rule laid down in Brimmer vs. Rebman. In that case the trouble was that the Statute of Virginia, concerning the inspection of fresh meat, discriminated against meat slaughtered one hundred miles or more from the place, in Virginia, at which it was offered for sale. And it was held by this Court that such discrimination of one cent per pound against meat slaughtered in Chicago, and in favor of meat slaughtered within a radius of one hundred miles from the place of sale, whether in Virginia or outside of the State, was a discrimination which

made the statute unconstitutional under the commerce clause. And this conclusion was reached as a necessary one, without any regard to what might have been the intent of the statute. The Court said, through Mr. Justice HARLAN:

"The owner of the meats here in question, although they were from animals slaughtered in Illinois, had the right under the Constitution to compete in the markets of Virginia, upon terms of equality, with the owners of like meats from animals slaughtered in Virginia or elsewhere, within one hundred miles from the place of sale. And a local regulation, which in terms, or by its necessary operation, denies this equality in the markets of a State, is, when applied to the people and products or industries of other States, a direct burden upon commerce among the States, and therefore void. Welton vs. Mo., 91 U. S. 275-281; R. R. Co. vs. Husen, 95 U. S. 465; Minnesota vs. Barber, 136 U. S. 313."

Now, we have here, in regard to the Louisiana Statute, a like unconstitutional regulation of interstate commerce, a like illegal burden, a similar denial of just competition.

The merchant in Shreveport or Baton Rouge, who imports, say, fifty thousand barrels of flour per annum from St. Louis or Minneapolis, can distribute the same as a jobber to the very doors of New Orleans

without being obliged to submit to any inspection or pay any inspection fees. The necessary result is that the statute in question is an illegal attempt, on the part of the Legislature of Louisiana, to regulate or interfere with, and to burden interstate commerce, and is specially injurious to appellees.

(3) As pointed out by the amendment to the bill, pp. 13 and 14, the inspection is not a *bona fide* exercise of the police power, but is simply illusory. It is "for revenue only," and does not protect the public.

II.

We do not think it necessary to review the argument of appellants concerning what is an import, or an import duty. Enough is alleged in the bill, and conceded by the demurrer, to support the decree of the lower court. If the pleader has made other points which are not sound, as, for example, on the meaning of "imports," that is no reason for reversal. *Utile per inutile non vitiatur.* And it is by no means certain that *Woodruff vs. Parham* has not been overruled on this point, in *Leisy vs. Hardin*, 135 U. S. 100.

III.

The decisions on which the appellants seem to rely are not in point against us. In *Smith vs. Alabama*, 124 U. S. 465, the opinion of the majority of the Court concerned a statute which applied equally to all engineers, and did not make, as to interstate com-

merce, the two conspicuous discriminations which are here complained of.

In *Pittsburgh Coal Co. vs. Louisiana*, 156 U. S. 590, we have substantially the same condition of things as a matter of law—a statute operating equally on all coal boats and barges in the State of Louisiana, without exception or distinction of origin, ownership, or destination.

It is not conceivable that your Honors have overruled *Voight vs. Wright*, *Brimmer vs. Rebman*, and *Minnesota vs. Barber*, without even an allusion. They have not been overruled. They control this case. They justify our complaint. Nor is *Woodruff vs. Parham*, 8 Wall. 123, against us, but, inferentially, in our favor; for in that controversy the tax which was questioned applied to all sales, whether made by a citizen of Alabama or by a citizen of another State, and whether the goods were the product of Alabama or of another State. Within the sphere of its operation it was equal, uniform, and without any discrimination as to interstate commerce. And Mr. Justice MILLER, in delivering the opinion said that if there had been such discrimination, the statute would have been void. 8 Wall. p. 140.

The statute we attack is in its essence and of necessity a regulation of, and an unjust discrimination in, interstate commerce, in the staff of life; and is there-

fore void, whether Congress has legislated on the subject or not.

Welton vs. Missouri, 91 U. S. 275; *Leisy vs. Hardin*, 135 U. S. 100; *Lyng vs. Michigan*, 135 U. S. 161; and other cases cited above.

And even where a State statute is legal on its face, it will not be permitted to be applied by State authority so as to interfere with interstate commerce. *Hall vs. Decuir*, 95 U. S. 485, 500.

The decree below simply enjoins the defendants from applying to complainants unjust discriminations in interstate commerce—and we ask that it be affirmed.

Respectfully submitted,

WM. WIRT HOWE,

Of Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES.

October Term, 1895.

No. 88.

BOARD OF FLOUR INSPECTORS, Etc.,
Appellants,

versus

BOOTH F. GLOVER Et Als., Appellees.

SUPPLEMENTAL BRIEF FOR APPELLEES.

WM. WIRT HOWE,
Of Counsel for Appellees.

April, 1896.

Thomason, Print., 526 Natchez Street, N. O.

SUPREME COURT OF THE UNITED STATES.

October Term, 1895.

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BOARD OF FLOUR INSPECTORS, Etc.,
APPELLANTS,

versus

BOOTH F. GLOVER Et Als., APPELLEES.

SUPPLEMENTAL BRIEF FOR APPELLEES.

By order of March 30th, 1896, your Honors gave time for additional briefs.

We respectfully submit:

I.

The decision of this Court, of December 9, 1895, dismissing the appeal to this Court (160 U. S. 170), may be justified by the dates and facts apparent on the record. The lower court rendered a final decree in our favor, January 25, 1892, declaring the Act of 1870 to be null and void. On the 28th June, 1892,

the General Assembly of Louisiana repealed the Act without any reservation. This action might well be held to be an acquiescence by the State in the previous decree in our favor, and to justify the dismissal of an appeal by a board of State officers. *Elwell vs. Fosdick*, 134 U. S. 500, 513; *Dakota County vs. Glidden*, 113 U. S. 222, 225.

II.

But however this may be (and the question does not appear to be an easy one), it yet seems plain that the repeal of the Act ought not to dismiss our bill in the lower court as contemplated in the order of March 2d, 1896. 161 U. S. 101, 103. The lower court gave us a final decree, and some months after that the Act was repealed. It was neither in the mind nor the power of the legislator to impair or affect our decree in any respect. The legislator acquiesced in that decree.

III.

There has never been any question made either in the court below or here of equity jurisdiction in this case. And the subject matter of the cause being one belonging to equity, such a question cannot properly be raised now. *Reynes vs. Dumont*, 130 U. S. 354-395, and cases there cited.

It would seem then that the decree made in our favor in the lower court is not to be questioned on this point.

IV.

But if this point, not made by counsel below or here, is now to be considered, we submit that the equity jurisdiction is maintained by the admitted allegations of the bill of complaint. We refer on this point to the interesting discussion of principles and precedents in Pomeroy on Eq. Jurisprudence, Sections 258 *et seq.* We do not present a mere case where there will be a multiplicity of suits because there are many complainants; but a case where there will be a multiplicity of small and vexatious suits against *each* complainant, on daily shipments. The complainants have a common interest in the question, and the question can be settled in one decree. And more than this, we show, and it is admitted, that there is no adequate remedy by payment under protest and suit to recover, the Board having no funds and there being no appropriation for refunding fees unduly paid.

V.

Upon the merits of the case, we submit, as in our original printed argument, that the decree of the lower court should be affirmed.

The complainants are each large importers of wheat flour from St. Louis and other cities of the northwest to New Orleans. Such importations amount to about 600,000 barrels per annum, the bulk of which is thus imported by the complainants. It is manifest that in

the competitions of modern commerce an imposition of two cents per barrel, if illegal, is an important matter. On the face of the statute and its application in the actual facts of the business of importing such an important article and jobbing it out to their customers in the markets of the State, the complainants are confronted with two remarkable facts:

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(2) But this is not all. Another element of illegality is found in this statute which was not present in *Voight vs. Wright*. It is averred in the bill and admitted by the demurrer, "that such interstate commerce in flour is also largely carried on from said points and places in other States, such as St. Louis, Mo., and other places, by importations made from

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This admitted discrimination brings the case also within the rule laid down in Brimmer vs. Rebman, 138 U. S. 78. In that case the trouble was that the Statute of Virginia, concerning the inspection of fresh meat, discriminated against meat slaughtered one hundred miles or more from the place, in Virginia, at which it was offered for sale. And it was held by this Court that such discrimination of one cent per pound against meat slaughtered in Chicago, and in favor of meat slaughtered within a radius of one hundred

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Respectfully submitted,

WM. WIRT HOWE,

Of Counsel for Appellees.

April, 1896.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 88.

THE BOARD OF FLOUR INSPECTORS FOR THE PORT OF NEW ORLEANS, APPELLANT,

versus

BOOTH F. GLOVER, AND FREDERICK ODENDAHL, CO PARTNERS, ET AL., APPELLEES.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

PETITION FOR REHEARING.

J. R. BECKWITH,
Counsel for Appellants and Petitioners.

A. W. HYATT STATIONERY M'F'G CO., LTD., 73 CAMP ST.—71,393.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 88.

THE BOARD OF FLOUR INSPECTORS FOR THE PORT OF NEW ORLEANS, APPELLANT,

versus

BOOTH F. GLOVER, AND FREDERICK ODENDAHL, CO-PARTNERS, ET AL., APPELLEES.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

PETITION FOR REHEARING.

To the Honorable Judges of the Supreme Court of the United States:

The appellants in the above entitled cause hereby humbly pray that the Court will rehear and reconsider the decree and determination made in this cause of the present term of this Honorable Court whereby the appeal in this cause was dismissed, and the decree of the Circuit Court of the United States for the Eastern District of Louisiana allowed to stand with its orders and decrees cutting off inquiry concerning the validity and justice of the decree ap-

pealed from, whereby the same will remain a perpetual bar and injunction against the assertion by appellants of any substantial right that they believe accrued to them during the period of nearly one year, which intervened between the preliminary injunction allowed against them and the supposed final repeal of the inspection law pending their appeal, they being advised that the action of this Court in dismissing the appeal leaves the injunction of the lower court in force against them and the final decree of the lower court below, pleadable as *res adjudicata* against their supposed lawful demand for fees due them prior to the date when the act of repeal became operative.

The grounds of this application are that the Court, in its decision, as evidenced by its written opinion on file in this cause, giving its reason for dismissing said appeal, inadvertently erred in respect to certain matters of fact and of law material to and decisive of said question, and, therefore, of the question whether said appeal should stand, and that in consequence of said errors, the decision of the Court was against the rights of your petitioner, as disclosed by the record in this cause.

The opinion of the Court, without going into detail, declares that this cause and the right to a trial of the issues involved, is determined by the doctrine announced by the Court at the present term in *Mills vs. Green*, No. 732 of the docket for the present term.

At the time of the dismissal of the appeal in this cause appellants and their counsel were not aware of the doctrine in that case, or it would have been considered in argument, and the attention of the Court called to the difference between *Mills vs. Green* and this cause, whereby the doctrine in that cause is not, as we believe, applicable to this cause by reason of the difference of both record and fact in the causes.

The appeal in *Mills vs. Green* was, as we respectfully submit, dismissed on the ground stated in the motion for dismissal: "*That*

there is now no actual controversy involving real and substantial rights between the parties to the record, and no subject matter upon which the judgment of this Court can operate."

We respectfully submit that while this was true in *Mills vs. Green*, instituted to control the action of a political officer in a matter of asserted political right claimed by the appellant, and the time within which that act could, if done, be of any avail to the appellant, had passed when the appeal from a decree refusing him the right was taken—that is, the members of the State Convention were elected, and the election a thing of the past; hence, no decree could operate or recall time or re-ordain an election of members. We submit that if the Court will reconsider the record in this cause it will find that it is not true that here the appellants disclose "*no actual controversy involving real and substantial rights between the parties to the record, and no subject matter upon which the judgment of this case can operate.*"

The decree of the Court, below with its preliminary and perpetual injunctions with the appeal dismissed, stands a *perpetual bar* against the recovery of both fees due and imposed when the bill was filed and for *the entire period of time between the allowance of the preliminary injunction and the repeal* of the inspection laws (Act 71, of 1870), which act of repeal was only signed by the Governor on the 28th of June, 1892, and which, under the provisions of Art. 40 of the present Constitution of the State could not have any legal effect until twenty days after promulgation at Baton Rouge, certainly not until the 18th of June, 1892, assuming that the act was published on the day it was signed, which is not probable, being a matter not disclosed on the face of the act and only provable *dehors*. The fees of the appellants as a Board of Inspection for nearly one year while the act was in force (if constitutional), *aside from dues not paid when the bill was filed*, are cut off by the decree appealed from and forever barred, if the decree of dismissal must stand as a practical affirmance of that decree.

We most respectfully call the attention of the Court to the record in support of our position. The bill was filed June 15th, 1891 (Record, page 1). On July 9th, 1891, the Court granted injunction *pendente lite* on condition of bond for $10,000.00, enjoining appellants "from demanding any inspection of flour," etc., and "*from demanding from complainants by suit or otherwise any fees for compulsory inspection established by said law.*" (Record, page 8).

This injunction is still in force unless superceded by the perpetual injunction on final decree of the same import, passed January 25th, 1892 (Record, page 17).

Aside from fees due before bill filed or injunction *pendente lite*, the appellants could not collect a dollar of fees from at least July 6th, 1891, until twenty days after June 28th, 1892, when the repealing act went into force as a repeal of the act under which the Board of Flour Inspectors was created, this period was at least one year.

We respectfully submit that, under the record, as it seems to us, this Court and under the terms of the repealed law the appellants have "*real and substantial rights*" in controversy, for upon the questions of whether the act assailed in the bill *while in force*, before repeal, was valid State legislation, depends their right to emolument under the act for more than one year before its repeal, the collection of which they cannot attempt without contempt of court for violation of an injunction, if, indeed, they are not barred by the adjudication of the Circuit Court on its merits, while that decree stands.

That there may be no question of substantial rights, at least in actual controversy in this cause, we respectfully call the attention of the Court to the terms of the act providing for flour inspection (Act 71, of 1870), and urgently ask the Court to reconsider the act in reference to the question whether the question

presented to the Court in this appeal is either moot or similar in character to the questions in *Mills vs. Green.*

The act, on its face, provides compulsory inspection and allows the appellants 2 cents per barrel while the act was in force. The bill avers that a large majority of the ninety-six firms and individuals made complainants respectively, import annually into New Orleans from 1,500 to 70,000 barrels of flour subject to inspection under the law they assail, which, at the legal inspection rate established by law, discloses the fact of record that the appellants have money interest in the question whether the law *was* a valid law between the date of the filing of the bill and the date when the repealing went into force, far exceeding $15,000.00, upon which the decree in the lower court practically affirmed in so far as it has effect as a decree by the decree of dismissal of appeal in this Court operates, not only the complete destruction, but also an inhibition against any attempt to collect it in any other tribunal.

We respectfully pray the Court to reconsider the question whether the doctrine in *Mills vs. Green* is applicable to this cause, or sufficient warrant for dismissing this appeal.

We respectfully submit the issue tendered by the appearers is not whether the inspection act is *now in force, but was it a valid law during the time when the fees were earned and up to the date when the repealing act went into force.* Under the State Constitution there can be no retroacting legislation.

On account of the supposed errors above referred to, and to the end, therefore, that equity may be done and that the Court may upon fuller consultation and with the advantage of printed or oral argument if the Court should so direct, revise its former opinion in this case (if revision be right and proper), your petitioner prays that the Court may be pleased to take these suggestions under

careful consideration and grant a rehearing upon the points upon which said decision was based, and grant such other relief and order as in equity and good conscience may be proper.

Respectfully submitted,

J. R. BECKWITH,

Counsel for Appellants and Petitioners.

I, J. R. Beckwith, counsel for the appellants and petitioners in this cause, do hereby certify that in my opinion the foregoing petition for rehearing is well founded in law.

J. R. BECKWITH.

Counsel.

SUPREME COURT OF THE UNITED STATES.

October Term, 1895.

No. 88.

BOARD OF FLOUR INSPECTORS, Etc.,
APPELLANTS,

versus

BOOTH F. GLOVER Et Als., APPELLEES.

PETITION FOR REHEARING.

W. W. HOWE,
Of Counsel for Appellees.

MARCH 13th, 1896.

Thomas n. Print., 526 Natchez Street, N. O.

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BOARD OF FLOUR INSPECTORS, ETC.,
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BOOTH F. GLOVER ET ALS., APPELLEES.

PETITION FOR REHEARING.

To the Honorable the Supreme Court of the United States:

The petition of the appellees in this case, who were complainants in the lower court, respectfully shows:

That, as they are advised and verily believe, there is error to their prejudice in the opinion and decree of this Honorable Court, pronounced on the 2d day of March, 1896, and they respectfully ask for a rehearing.

They show to the Court that on the 2d day of December, 1895, their counsel was present in open court, and the case being called for further argument, their counsel proceeded with intent to argue the case upon

the merits. That before he could begin his oral argument he was asked by the Court whether the Act of the General Assembly of Louisiana in question had been repealed, and he replied in the affirmative. He was then asked whether there was anything to argue in the case, and he replied that there might be a question of fees claimed by the appellants, accruing *pendente lite*. He was then asked whether this was a suit for fees, and necessarily replied in the negative. He then proceeded to open the case with an oral discussion upon the merits, when he was stopped by his Honor, the Chief Justice, who, after a reference to the case of Mills vs. Green, informed counsel that it was not necessary for him to make any argument, whereupon the appellees' counsel took his seat.

On the 9th of December, 1895, the opinion and decree of the Court were rendered dismissing the appeal. 160 U. S. 170.

A petition for rehearing was then filed by the appellants, the object of which was to obtain a rehearing of the cause; and petitioners show that, as they are advised and believe, the legal effect of granting such a petition would be to reopen the cause for the oral discussions of the important questions which it involves.

But petitioners show that, on the 2d of March, 1896, your Honors, without ever having heard argument from petitioners' counsel, have rendered another opinion and decree, as follows: "The order hereinbefore en-

tered dismissing the appeal will, therefore, be vacated, and the decree reversed, without costs to either party, and the cause remanded to the Circuit Court with a direction to dismiss the bill."

Your petitioners beg to refer to some dates in the transcript. By referring to page 18, it will be seen that the final decree in the lower court in favor of the appellees was rendered and signed January 25th, 1892. The Act in question had not then been repealed. The repealing Act of 1892, Session Acts, page 34, was only passed June 28th, 1892. The repeal of the Act, therefore, by the State, however it may affect the appeal taken by the Board of Flour Inspectors, or their rights as a Board of State officers, certainly could not affect or impair a final decree which had been rendered, six months before the repeal, in favor of the appellees. If therefore your Honors' decree of March 2d, 1896, as quoted above, is based upon the fact that the statute in question was repealed six months *after* the decree of the Circuit Court was rendered and signed, it is respectfully submitted that the action of your Honors is erroneous, and prejudicial to the rights of the appellees. But if your Honors' decree of March 2d, 1896, reversing our decree of January 25th, 1892, is based upon the theory that the flour inspection act in question is constitutional, then it has been rendered without hearing the oral discussion which was offered upon the subject, and your petitioners have been deprived of what-

ever benefit might have come to them from such oral discussion. They had been advised that the case would be governed by such decisions as Voight vs. Wright, 141 U. S. 62; Brimmer vs. Rebman, 138 U. S. 78, and the other cases cited in their brief, and which they desired to have orally discussed. It results that if your Honors' decree of March 2d, 1896, is based upon a finding that the Act in question is constitutional, it involves a double error: *first*, in rendering such a decision without hearing the argument which was offered by counsel; and *second*, in deciding the Act to be constitutional, when, as petitioners respectfully submit, it is plainly unconstitutional.

If your Honors have rendered the decree of March 2d, 1896, solely on the ground that the bill cannot be maintained for an injunction against bringing actions at law, if appellants should be so advised, then petitioners respectfully submit that this action is erroneous and prejudicial for two reasons. In the *first* place, as pointed out in the original brief on behalf of the appellees, no question was ever made in the lower court or here with respect to equity jurisdiction as such, and the suit for an injunction and decree was confessedly one belonging to the class over which a Court of Equity has jurisdiction. It was never pretended by the appellants, who were defendants in the lower court, that there was any want of equity jurisdiction. The sole contention, there and here, was

that the Act in question was constitutional. In Reynes vs. Dumont, 130 U. S. 354-395, referring to Wylie vs. Coxe, 15th Howard, 415-420, the rule was laid down, that where the subject matter belongs to a class over which the Court of Equity has jurisdiction, and the question of want of equity jurisdiction has not been raised in the lower court, it is too late to raise it in the appellate court, even if the appellants desire to do so. But when the appellants, as in the case at bar, have never raised such a question at all, *either in the lower court or in the appellate court*, it would seem to be plain that the reversal of our decree and the dismissal of our bill by the Court itself, in the manner ordered in this case, is erroneous.

In the *second place*, the presence in the final decree of the lower court of a clause forbidding suits at law was proper, if the Statute was, as the lower court held, and as we contend, void for unconstitutionality. Such a decree is equitable. High on Injunctions, §12.

But even if that portion of the decree does not meet the approval of your Honors, it does not afford any reason to reverse the *entire decree* and to dismiss our bill. We respectfully submit that our bill is a good bill on the admitted facts; that the lower court has held the Statute in question to be void; and that, even if the prohibition to bring suits is to be annulled, the bill may stand as a bill to have a decree to declare the Act void, and as otherwise prayed for.

Your petitioners further beg to refer to and consider the future of this litigation. They have applied to the courts of their country for interpretation and for relief. What has been the result? Is the Act of 1870, in question here, valid or invalid? Is the decree of March 2d, 1896, a decree which settles it to be valid or invalid? Is your Honors' decree, of March 2d, 1896, *res judicata* against us on the question of constitutionality *vel non*, or is it not? Is the contemplated suit for fees to be fought out on that question or not? With great deference we submit that we should be heard on these vital points.

Your petitioners respectfully ask for a rehearing, and on that rehearing for an opportunity for their counsel to argue the case.

And they will ever pray.

W. W. HOWE,
For Petitioners.

I certify that, in my opinion, the foregoing application for a rehearing is well founded in fact and law.

W. W. HOWE,
Of Counsel for Appellees.

March 13th, 1896.